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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 248

VICTORIO NOGUEIRA, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The petition of VICTORIO NOGUEIRA respectfully shows to this Honorable Court as follows:

The petitioner brought this action under the Federal Employers' Liability Act, to recover damages for personal injuries sustained by him through the negligence of the Railroad Company while in its employ as a freight handler. The Railroad Company was an interstate carrier and the petitioner at the time he was hurt was engaged in the furtherance of the carrier's

business of interstate commerce (fol. 60). At the time he was hurt, he was working on a railroad float lying in the East River, New York Harbor, loading freight into the freight cars situated on the float (fols. 61, 73, 77, 79).

The Trial Judge dismissed petitioner's complaint, holding that the Federal Employers' Liability Act was not applicable to this case, on the ground that it was supplanted by the Longshoremen's & Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424; 33 U. S. C. A. 901-950). This Act provides for compensation for certain maritime employees injured while working in navigable waters, and makes the acceptance of compensation compulsory and exclusive of any right at law or in admiralty for such injury.

Petitioner appealed from the judgment in favor of the respondent, to the Circuit Court of Appeals, for the Second Circuit, assigning as error the Trial Court's dismissal of petitioner's complaint. The Circuit Court of Appeals affirmed the judgment entered on the dismissal of the Trial Judge, holding in effect, that the Longshoremen's & Harbor Workers' Compensation Act supplanted the Federal Employers' Liability Act in so far as it referred to railway employees engaged in maritime employment.

So far as is material, the facts in your petitioner's case may be stated as follows:

While using a hand truck and carrying a bale of paper weighing approximately 1,200 pounds, from the dock on to the float, the bale, together with the truck

were permitted to fall upon petitioner, causing him to sustain a compound fracture of his leg (fols. 82, 88, 89). To truck the bale from the dock on to the float, it was necessary to move it over a plank running from the dock to the float (fol. 83). Since the tide was low and the float was several feet lower than the dock, this plank was at a fairly steep incline (fols. 86, 87). It was therefore necessary, when moving this truck over the plank, to have several men fasten hand hooks into the bale while it was being moved down the plank by the plaintiff (fols. 94, 95). For this purpose, there were four or five men who were assigned to help the petitioner bring this truck and bale down the plank on to the float. They stuck their hooks into the bale for the purpose of retarding the speed with which it would descend down the plank, but as the petitioner started down, these men let go with their hooks and failed to hold the bale, with the result that the truck and the bale skidded down the plank, throwing the petitioner to the floor and crushing his leg beneath it (fols. 95-105).

On these facts, the petitioner was prepared to predicate negligent conduct on the part of the respondent.

It was admitted by the carrier that the bale which the petitioner was moving was a piece of interstate freight destined from New York to Connecticut (fol. 60). This fact, of course, establishes the interstate character of petitioner's employment. B. & W. S. S. Ry. Co. *v.* Burtch, 263 U. S. 540; Ill. Central Ry. *v.* Porter, 207 Fed. 311, C. C. A., 6th Cir.

With these facts proved, there was no warrant for supposing that petitioner's remedy, so clearly defined and established by a long line of decisions, was not governed by the Federal Employers' Liability Act. Indeed, the holding is the first of its kind in a court of record. The appeal to the Circuit Court of Appeals was based on the point that the Longshoremen's & Harbor Workers' Compensation Act had no application to petitioner in this case; that it was never intended to have any application to one in petitioner's position, and that the whole meaning of the Statute is distorted by any such interpretation as we have in the case at bar.

Petitioner also contended that it was never the intent of Congress, in enacting this Statute, to make it applicable to railway employees engaged in interstate commerce; that the wording of the Statute is not sufficiently broad to include interstate railway employees, and that the term "maritime employment" was not intended to cover those employees engaged in an adjunct to transportation by rail.

Your petitioner submits that this petition for a writ of certiorari should be granted for the following reasons:

1st. The petitioner having been engaged in the furtherance of the carrier's business of interstate commerce, and the Railroad Company being an interstate carrier, the case is governed by the Federal Employers' Liability Act.

2nd. The decision of the Circuit Court of Appeals, making the Longshoremen's & Harbor Workers' Com-

pensation Act applicable to the petitioner herein, gives the latter Statute the effect of a repeal of the Federal Employers' Liability Act, although there is not a word in the Statute to indicate that such a repeal was contemplated, even by implication.

3rd. That a repeal of a Statute by implication is not favored by this Court.

4th. That the question arising in this case has never been determined before by this Court, and the decision of the Circuit Court of Appeals is the first holding of an Appellate Court on the subject.

Your petitioner presents herewith as part of this petition a brief of the law upon the question involved, and a certified transcript of the record of the Circuit Court of Appeals.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court upon a day certain, to be therein designated, a full transcript of the record of all the proceedings of the said Circuit Court of Appeals in this case, which was entitled in that court "Victorio Nogueira, Appellant, against The New York, New Haven and Hartford Railroad Company, Respondent," to the end that said cause may be reviewed and determined by this Court as required by law, and that your petitioner may have such other and further

remedy in the premises as to this Court may seem appropriate, and that the judgment of said Circuit Court of Appeals may be reversed by this Honorable Court.

VICTORIO NOGUEIRA,
By HUMPHREY J. LYNCH,
His Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 248

VICTORIO NOGUEIRA, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, RESPONDENT.

BRIEF ON BEHALF OF VICTORIO NOGUEIRA IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

This cause came before the Circuit Court of Appeals, for the Second Circuit, on an appeal from a judgment of the United States District Court, for the Southern District of New York, in favor of the respondent. The judgment was affirmed by the Circuit Court of Appeals.

Point I.

The District Court and the Circuit Court of Appeals erred in holding that the "Longshoremen's & Harbor Workers' Compensation Act" applied to a railway employee engaged in interstate commerce.

The title of the Statute is, "An Act to Provide Compensation for Disability or Death Resulting from Injury to Employees in Certain Maritime Employments and for other Purposes." The short title is, "Longshoremen's & Harbor Workers' Compensation Act." The sections of the Act which are relevant to the situation here are Subdivisions 3 and 4 of Section 2.

Subdivision 3 of Section 2 reads as follows:

> "The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

It should be noted that the definition of "employee," as contained in the statute, is a negative one. It does not define who are "employees," but merely excludes Seamen. However, under Subdivision 4, Section 2, the definition of "employer" seems to furnish some information as to who are "employees." It reads as follows:

> "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

The statute being a compulsory compensation statute, makes it obligatory upon an employer, any of whose employees are employed in maritime employment, to conform thereto. It would also seem that any employee engaged in maritime employment, would necessarily be bound by this statute.

It is plain however, that the act has reference to longshoremen and harbor workers engaged in maritime employment. If an employee of a railway carrier engaged in an adjunct of transportation by rail, or engaged in work such as the petitioner was doing in this case, is deemed to be employed in a maritime pursuit within the meaning of the statute, then the act is of course applicable. Our contention, however, has been that employment in interstate commerce in an adjunct to transportation by rail is not maritime employment within the meaning of this statute. We find authority for this statement from an expression of opinion by this Court in *Southern Pacific Co. v. Jensen*, 244 U. S. 207.

In that case, one of the reasons for the Southern Pacific Co.'s objection to the application of the New York State Compensation Law to a longshoreman, was that it was a common carrier by railroad, and that such longshoreman was engaged in interstate commerce. This Court, however, held that although the Southern Pacific Co. was a common carrier by railroad, in its transaction of business as an operator of ocean-going ships, it is not acting as a common carrier by railroad, and consequently the employee who was injured in loading one of their vessels was engaged

in maritime employment and not in any work having direct or substantial connection with railroad operations. Let us examine the extract from that decision (p. 213):

> "Evidently the purpose was to prescribe a rule applicable where the parties are engaging in something having direct and substantial connection with railroad operations, and not with another kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto. It is unreasonable to suppose that Congress intended to change long-established rules applicable to maritime matters merely because the ocean-going ship concerned happened to be owned and operated by a company also a common carrier by railroad. The word 'boats' in the statute refers to vessels which may be properly regarded as in substance but part of a railroad's extension or equipment as understood and applied in common practice."

The significance of this expression on the part of the Court, is that the Court has recognized that there is a distinction between one engaged in employment on navigable waters for a common carrier, engaged in carriage recognized as separate and distinct from transportation on land, and one engaged in employment on navigable waters for a common carrier in carriage which is an adjunct to transportation by rail. For that reason, the longshoreman in the cited case, who was engaged in a distinctly maritime employment, did not come within the Federal Employers' Liability Act.

The wording of the Federal Employers' Liability Act, specifically referring to the word "boats" contained therein, indicates, as this Court pointed out, that in the application of the Act, employment on navigable waters in connection with transportation by rail, was not to be considered maritime with the same provenience as the word is used in connection with longshoremen.

It has always been held that employees of a common carrier engaged on navigable waters in an adjunct to transportation by rail come within the Federal Employers' Liability Act.

Erie R. Co. v. Jacobus, 221 Fed. 335; C. C. A. 3rd Cir.

The Passaic, 204 Fed. 266.

Section 5 of the Statute relates to the exclusiveness of the compensation liability imposed by the Act. It reads as follows:

> "The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such

> injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

The Circuit Court of Appeals interpreted this section to mean that "exclusive of any right at law or in admiralty" means exclusive of the right under the Federal Employers' Liability Act. This interpretation was based upon the theory that the petitioner herein was engaged in maritime employment within the meaning of this compensation statute.

The wording of the latter part of the section—wherein it provides that upon the employer failing to secure payment of compensation, the injured employee has his election to claim compensation or to maintain an action at law or in admiralty, and in such an action the defendant may not plead that the injury was caused by the negligence of a fellow-servant—indicates that the Act was not intended to apply to railway employees engaged in interstate commerce, for common carriers were never permitted to plead such defense in an action under the Federal Employers' Liability Act. This part of the section purports to add something to the rights of railway employees and to take away a defense from the carrier. With respect to railway employees, it adds nothing to their rights, and with respect to the carrier, takes nothing away.

The Act also provides that the defense of assumption of risk is unavailable where the employer has failed to secure the payment of compensation.

To a railway employee engaged in interstate commerce, injured through a violation of a Safety Statute, the carrier cannot interpose the defense of assumption of risk. If a railway employee were injured on a railroad float lying in navigable waters, through a violation of a Safety Statute, the defense of assumption of risk would not be available to the carrier. The Statute, therefore, is meaningless in that respect, insofar as railway employees engaged in interstate commerce are concerned.

These attributes of the Statute indicate that it was intended to apply to that class of maritime employees who merely had a right of action at common law. By the interpretation given to the Statute by the Circuit Court of Appeals, it in effect repeals in part, not only the Federal Employers' Liability Act, but the Safety Appliance Act, and the Boiler Inspection Act, for employees injured on a railroad float in navigable waters, by reason of a violation of these statutes, must necessarily come within this compensation statute if the decision is carried to its logical conclusion.

Point II.

The intention of Congress was to provide compensation for longshoremen and other maritime employees, and not for railway employees engaged in interstate commerce.

Statements contained in the report of the Judiciary Committee of the Senate (Senate Report 973, page 10467, 69th Congress) indicate that the Act was in-

tended to provide for compensation for a class of employees known as "longshoremen." Statements made in the course of debate in the Senate indicate that the bill was designed to relieve longshoremen and others engaged in maritime pursuits, from the rigors of the common law, and to remedy the situation of this class of employees in conformity with the suggestion made by this Court in *Washington v. Dawson & Co.*, 264 U. S. 219.

The Bill as originally prepared was so drawn as to include seamen (Senate Bill 3170, 69th Congress, page 4119). At the same session of Congress on March 2, 1927, passage of the Bill was debated in the House of Representatives (pages 5402-5414), and Section 2, subdivision 3, was so amended as to exclude seamen. Passage of the Bill was also debated in the Senate on March 4, 1927 (pages 5900-5909), and explanation was made by the Chairman of the Judiciary Committee as to why seamen were excluded from the Act. The Act, as it now stands, specifically excludes seamen from its operation.

Bearing in mind the fact that seamen injured through negligence, enjoy the same privileges as railway employees engaged in interstate commerce, and occupy the same position with respect to their rights and remedies under the law, their original specific inclusion in the Bill becomes very significant. If the intention was at any time to include railway employees, it would seem that some reference in the Bill as originally drawn would have been made to railway employees engaged in interstate commerce.

Point III.

The interpretation given to the statute by the Circuit Court of Appeals leads to inconsistencies and confusion in the rights and remedies of railway employees engaged in interstate commerce, contrary to the intent of Congress.

Petitioner contended before the Circuit Court of Appeals that if it were held that this Compensation Statute applied to him, it would in effect amount to a holding that all railway employees injured while working on a car float in navigable waters, whether they be brakemen, locomotive engineers, conductors or other railway employees, would be deprived of their right of action under the Federal Employers' Liability Act. And if injured through a violation of the Safety Appliance Act or Boiler Inspection Act, they would be deprived of their rights under these Statutes. For, if petitioner was engaged in maritime employment, then a brakeman engaged in loading railroad cars on to a railroad float, is necessarily engaged in the same kind of employment. There is hardly a distinction between loading railroad cars on to a float, and loading package freight into the cars situated on the float.

This question the Circuit Court of Appeals passed by without deciding. And yet it seems to petitioner that a decision of this question was indispensable to the correct disposition of the problem arising with regard to petitioner's case.

This Court has recognized that the Federal Employers' Liability Act applies to those employees,

whether working on land or on water, engaged in transportation by rail or in an adjunct thereto, in the furtherance of the carrier's business of interstate commerce. In the past, it has held that a freight handler comes within the Federal Employers' Liability Act. *B. & W. SS. Ry. Co. v. Burtch,* 263 U. S. 540. It is therefore difficult to perceive how an arbitrary distinction can be made between a freight handler and a brakeman.

Perhaps no distinction has been made by the Circuit Court of Appeals, but at any rate, if the brakeman be deemed to come within the Compensation Statute, then it is apparent that the Statute has a repealing effect upon the Federal Employers' Liability Act, which is far reaching in scope, and hardly in consonance with the policy of Congress to directly legislate with regard to railway employees engaged in interstate commerce.

Furthermore, repeals by implication are not favored by this Court.

McCool v. Smith, 66 U. S. 419.
United States v. Greathouse, 166 U. S. 601.
Cope v. Cope, 137 U. S. 682.

Conclusion.

IT IS RESPECTFULLY SUBMITTED THAT BECAUSE OF THE FOREGOING, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

HUMPHREY J. LYNCH,
Counsel for Petitioner.

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Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 248.

VICTORIO NOGUEIRA,

Petitioner,

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

BRIEF IN SUPPORT OF WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Humphrey J. Lynch,
SOL GELB,
Counsel for Petitioner.

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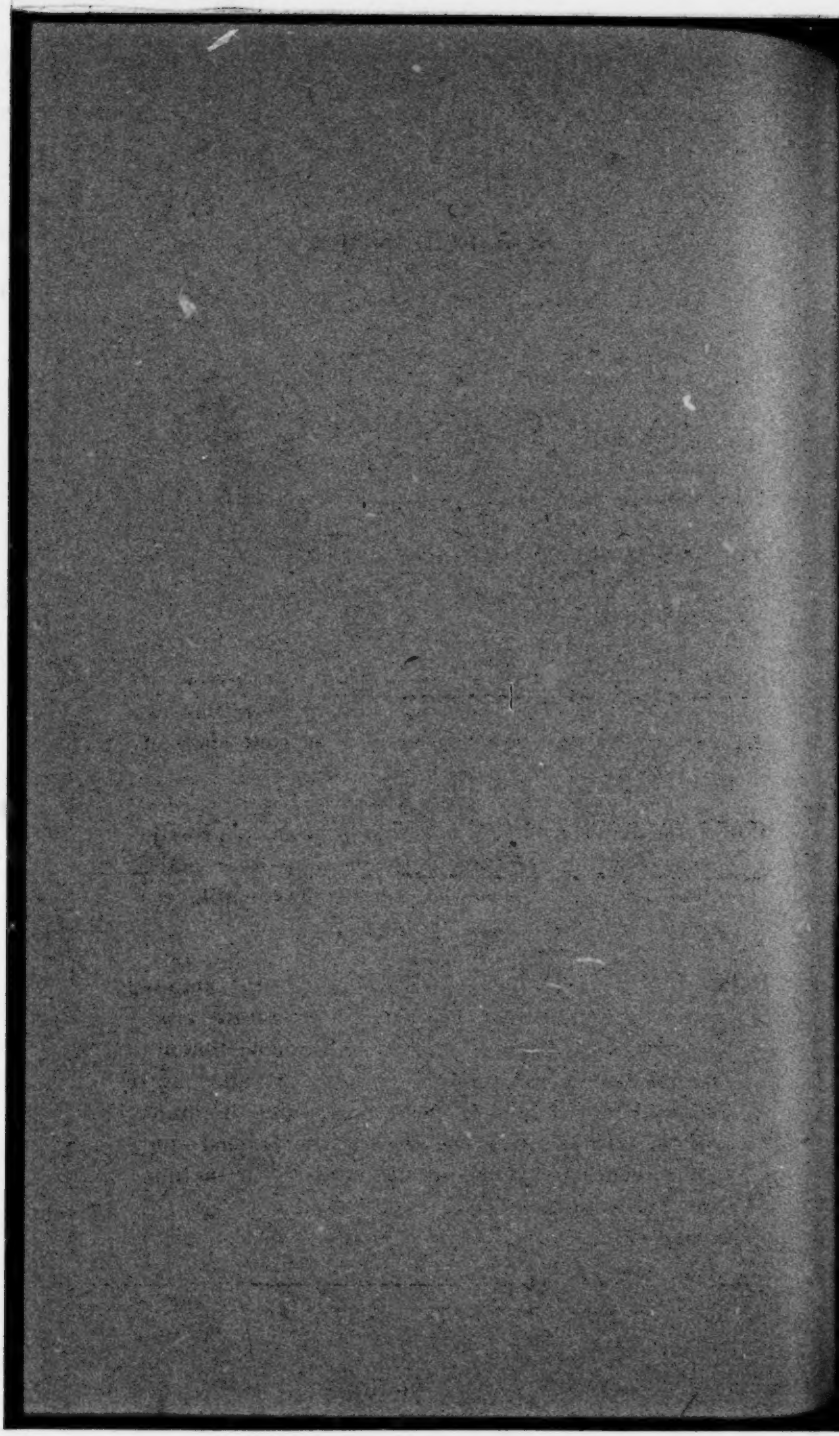

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Petitioner,

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

BRIEF IN SUPPORT OF WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

I.

The Opinions of the Court Below.

The District Court dismissed petitioner's complaint, rendering no reported opinion (R. 52).

The Circuit Court of Appeals affirmed the judgment of the District Court, and rendered an opinion (R. 55-61); reported *Nogueira* v. *N. Y., N. H. & H. R. Co.*, 32 Fed (2nd) 17?.

II.

Jurisdiction.

The point presented in this case involves the interpretation of a Federal statute, namely, the Longshoremen's

& Harbor Workers' Compensation Act, 33 U. S. C. A., Sections 901-950.

This Court granted petitioner's application for a writ of certiorari on October 21, 1929 (R. 62).

III.

Statement of the Case.

The petitioner brought this action under the Federal Employers' Liability Act, to recover damages for personal injuries sustained by him through the negligence of the railroad company, while in its employ as a freight handler. The railroad company was an interstate carrier and the petitioner, at the time he was hurt, was engaged in the furtherance of the carrier's business of interstate commerce (R. 13).

At the time he was hurt, he was working on a railroad float lying in the East River, New York Harbor, loading freight into freight cars situated on the float. The trial Judge dismissed petitioner's complaint, holding that the Federal Employers' Liability Act was not applicable to this case, because of the existence of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424; 33 U. S. C. A. 901, 950). This act provides for compensation for certain maritime employees injured while working on navigable waters, and makes the acceptance of compensation compulsory and exclusive of any right at law or in admiralty for such injury.

The Circuit Court of Appeals upheld the dismissal of the trial Judge, holding in effect that the Longshoremen's and Harbor Workers' Compensation Act supplanted the Federal Employers' Liability Act in so far as it

referred to railway employees engaged in maritime employment.

So far as is material, the facts in petitioner's case may be stated as follows:

Petitioner was working at Pier 42, East River, as part of a gang of freight handlers loading freight into freight cars situated on a railroad float lying in the East River (R. 13, 17, 18). While using a hand truck in carrying a bale of paper weighing approximately 1,200 pounds, from the dock on to the float, the bale, together with the truck, were permitted to fall upon petitioner, causing him to sustain personal injuries (R. 19, 21, 22).

To truck the bale from the dock onto the float, it was necessary to move it over a plank running from the dock to the float (R. 20). Since the tide was low and the float was several feet lower than the dock, this plank was at a fairly steep incline (R. 21). It was therefore necessary, when moving this truck over the plank, to have several men fasten hand hooks into the bale, while it was being moved down the plank by petitioner (R. 23). For this purpose, there were four or five men who were assigned to help the petitioner bring this truck and bale down the plank onto the float. They stuck their hooks into the bale for the purpose of retarding the speed with which it would descend down the plank, but as the petitioner started down, these men let go with their hooks and failed to hold the bale, with the result that the truck and the bale skidded down the plank, throwing the petitioner to the floor and crushing his leg beneath it (R. 23-26).

Upon these facts, the petitioner was prepared to predicate negligent conduct on the part of the respondent.

It was admitted by the carrier that the bale which petitioner was moving was a piece of interstate freight destined from New York to Connecticut (R. 13). This fact, of course, establishes the interstate character of petitioner's employment. *B. & W. S. S. Ry. Co.* v. *Burtch*, 263 U. S. 540; *Ill. Central Ry.* v. *Porter*, 207 Fed. 311, C. C. A., 6th Cir.

Under this state of facts, the petitioner's right to maintain an action under the Federal Employers' Liability Act, has heretofore been settled. *B. & W. S. S. Ry. Co.* v. *Burtch, supra; Illinois Central Ry.* v. *Porter, supra; Erie R. R. Co.* v. *Jacobus*, 221 Fed. 335 (C. C. A. 3).

IV.

Specification of Errors.

The District Court and the Circuit Court of Appeals erred in holding that the Longshoremen's and Harbor Workers' Compensation Act applied to petitioner, a railway employee engaged in interstate commerce.

V.

Argument.

POINT I.

The wording of the statute is barren of any reference to interstate railway employees, and its substance does not include that class of employees.

The title of the statute is, "An Act to Provide Compensation for Disability or Death Resulting from Injury to Employees in Certain Maritime Employments and for other Purposes." The short title is, "Longshoremen's and Harbor Workers' Compensation Act." The sections of the act which are relevant to the situation here are subdivisions 3 and 4 of Section 2.

Subdivision 3 of Section 2 reads as follows:

> "The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

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> "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

The statute being a compulsory compensation statute, makes it obligatory upon an employer, any of whose employees are employed in maritime employment, to conform thereto. It would also seem that any employee engaged in maritime employment, would necessarily be bound by this statute.

It is plain, however, that the act has reference to longshoremen and harbor workers engaged in maritime employment. If an employee of a railway carrier engaged in an adjunct of transportation by rail, or engaged in work such as the petitioner was doing in this case, is deemed to be employed in a maritime pursuit within the meaning of the statute, then the act is of course applicable. Our contention, however, has been that employment in interstate commerce in an adjunct to transportation by rail is not maritime employment within the meaning of this statute. We find authority for this statement from an expression of opinion by this Court in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 207.

In that case, one of the reasons for the Southern Pacific Co.'s objection to the application of the New York State Compensation Law to a longshoreman, was that it was a common carrier by railroad, and that such longshoreman was engaged in interstate commerce. This Court, however, held that although the Southern Pacific Co. was a common carrier by railroad, in its transaction of business as an operator of ocean-going ships it was not acting as a common carrier by railroad, and consequently the employee who was injured in loading one of their vessels was engaged in maritime employment and not in any work having direct or substantial connection with

railroad operations. Let us examine the extract from that decision (p. 213):

> "Evidently the purpose was to prescribe a rule applicable where the parties are engaging in something having direct and substantial connection with railroad operations, and not with another kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto. It is unreasonable to suppose that Congress intended to change long-established rules applicable to maritime matters merely because the ocean-going ship concerned happened to be owned and operated by a company also a common carrier by railroad. The word 'boats' in the statute refers to vessels which may be properly regarded as in substance but part of a railroad's extension or equipment as understood and applied in common practice."

The significance of this expression on the part of the Court, is that the Court has recognized that there is a distinction between one engaged in employment on navigable waters for a common carrier engaged in carriage recognized as separate and distinct from transportation on land, and one engaged in employment on navigable waters for a common carrier in carriage which is an adjunct to transportation by rail. For that reason, the longshoreman in the cited case, who was engaged in a distinctly maritime employment, did not come within the Federal Employers' Liability Act.

The wording of the Federal Employers' Liability Act, specifically referring to the word "boats" contained therein, indicates, as this Court pointed out, that in the application of the Act, employment on navigable waters in connection with transportation by rail, was not to be

considered maritime with the same provenience as the word is used in connection with longshoremen.

It has always been held that employees of a common carrier engaged on navigable waters in an adjunct to transportation by rail come within the Federal Employers' Liability Act.

Erie R. Co. v. *Jacobus,* 221 Fed. 335; C. C. A. 3rd Cir.;
The Passaic, 204 Fed. 266.

Section 5 of the Statute relates to the exclusiveness of the compensation liability imposed by the Act. It reads as follows:

> "The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

The Circuit Court of Appeals interpreted this section to mean that "exclusive of any right at law or in ad-

miralty" means exclusive of the right under the Federal Employers' Liability Act. This interpretation was based upon the theory that the petitioner was engaged in maritime employment within the meaning of this compensation statute.

The wording of the latter part of the section—wherein it provides that upon the employer failing to secure payment of compensation, the injured employee has his election to claim compensation or to maintain an action at law or in admiralty, and in such an action the defendant may not plead that the injury was caused by the negligence of a fellow-servant—indicates that the Act was not intended to apply to railway employees engaged in interstate commerce, for common carriers were never permitted to plead such defense to defeat a recovery in an action under the Federal Employers' Liability Act. This part of the section purports to add something to the rights of railway employees and to take away a defense from the carrier. With respect to railway employees, it adds nothing to their rights, and with respect to the carrier, takes nothing away.

The Act also provides that the defense of assumption of risk is unavailable where the employer has failed to secure the payment of compensation.

To a railway employee engaged in interstate commerce, injured through a violation of a Safety Statute, the carrier cannot interpose the defense of assumption of risk (Federal Employers' Liability Act, Sec. 4). If a railway employee were injured on a railroad float lying in navigable waters, through a violation of a Safety Statute, the defense of assumption of risk would not be available to the carrier. The statute, therefore, is meaningless in that respect, in so far as railway employees engaged in interstate commerce are concerned.

These attributes of the Statute indicate that it was intended to apply to that class of maritime employees who merely had a right of action at common law.

POINT II.

The intention of Congress was to provide compensation for longshoremen and other maritime employees, and not for railway employees engaged in interstate commerce.

The bill first came before the Senate as Senate Bill No. 3170, on February 17, 1926, in the First Session of the 69th Congress (p. 4119). It was referred to the Judiciary Committee. The Committee reported to the Senate on June 2, 1926 (Senate Report 973, p. 10467), and in the report there is contained the following statement:

> "The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as 'Longshoremen'. These men are mainly employed in loading, unloading, refitting and repairing ships; but it should be remarked that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship, so as to bring them within the Maritime jurisdiction of the United States. There are in the neighborhood of 300,000 men so employed in the entire country."

This statement makes it plain that the bill was designed to cover a class of employees engaged in maritime pursuits, such as "loading, unloading, refitting and repairing ships", and requires little comment. On June 3, 1926, consideration of the bill was before the Senate

(pp. 10608-10614) and Senator Walsh, one of the members of the Judiciary Committee, speaking for the passage of the bill, made the following statement (p. 10614):

> "Mr. President, I hope the bill will have the consideration of the Senate. It is a very important measure. Under various decisions of the Supreme Court of the United States, those who are generally known as Longshoremen are not permitted to receive the benefit of the Workmen's Compensation Acts passed by the various States, the Supreme Court holding that they belong to the Maritime service and are, therefore, under the exclusive jurisdiction of the Congress of the United States. When that decision was rendered, Congress passed an Act, the purpose of which was to bring such workmen under the State acts, but the Supreme Court again held that such legislation was beyond the power of Congress. So it becomes necessary to enact a special Compensation Act for workmen of that class."

In this statement, the Senator speaks of the United States Supreme Court denying to longshoremen the right to compensation under various State Acts and the futile attempt by Congress, to remedy this situation by the passage of an act which was also held ineffectual by the United States Supreme Court. What he had in mind by this expression is apparent.

The U. S. Supreme Court, in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 207, held that a longshoreman, injured while working in navigable waters in the State of New York, was not entitled to compensation under the Workmen's Compensation Act of the State of New York, the basis of the holding being founded on the principle that

the injured man's employment was maritime in nature and had direct relation to navigation or commerce. That therefore, the State of New York had no power to legislate with respect to admiralty matters affecting the maritime jurisdiction of the United States. In the decision, it was stated that Congress alone had the power to legislate with regard to this subject. Accordingly, therefore, Congress legislated by the passage of an act undertaking to amend the provisions of Sections 24 and 256 of the Judicial Code (Act of October 6, 1917, Chapter 97, 40 Stat. At. L. 395, Comp. Stat. Sec. 991 (3) Fed. Stat. Anno. Supp. 1918, page 401).

The sections sought to be amended were those which save to suitors in all civil causes of admiral.y and maritime jurisdiction "the right of a common law remedy where the common law is competent to give it". These sections were amended by adding to them the words, "and to claimants the rights and remedies under the Workmen's Compensation Law of any state". The purpose of this amendment was to permit application of the Workmen's Compensation Laws of the several states to injuries falling within the admiralty and maritime jurisdiction. In *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, the United States Supreme Court declared this Act unconstitutional and beyond the power of Congress. It held that only Congress had the right to legislate with regard to maritime matters and that it was not empowered to delegate it to others.

Again an attempt was made to remedy the situation by amending Sections 24 and 256 of the Judicial Code, by adding the words, "and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and

remedies under the Workmen's Compensation Law of any state, district, territory or possession of the United States". This amendment was substantially similar to that of 1917, except that it excluded seamen from the operation of the Act.

The United States Supreme Court, in *Washington* v. *Dawson & Co.*, 264 U. S. 219, declared this enactment unconstitutional and beyond the powers of Congress. The reasoning was the same as that in the *Stewart* case, *supra*, and in effect expressed the opinion that Congress had the power to alter or revise the maritime law by statutes of general application, but it could not delegate that power to the several states.

We need only quote one short extract of the United States Supreme Court decision to show to what extent Congress was influenced by the opinion of the Court in the passage of the Act under discussion here (p. 227):

> "Without doubt, Congress has power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law, or general provisions for compensating injured employees; but it may not be delegated to the several states. The grant of admiralty and maritime jurisdiction looks to uniformity; otherwise wide discretion is left to Congress. *Knickerbocker Ice Co.* v. *Stewart.* Exercising another power,—to regulate commerce,—Congress has prescribed the liability of interstate carriers by railroad for damages to employees (Act April 22nd, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. Sec. 8657, 8 Fed. Stat. Anno. 2d ed., p. 1208), and thereby

abrogated conflicting local rules. *New York C. R. Co.* v. *Winfield,* 244 U. S. 147, 61 L. ed. 1045, L. R. A. 1918 C, 439, 37 Sup. Ct. Rep. 546, Ann. Cas. 1917 D, 1139, 13 N. C. C. A. 680."

When Senator Walsh, in speaking for the passage of the act in question, said, "So it becomes necessary to enact a special compensation act for workmen of that class", he was merely stating that the bill was an adoption of one of the two suggestions made by the United States Supreme Court in its decision. The decision speaks of the power to enact a general employers' liability law, and the power to provide for compensating injured employees.

From this short analysis of the acts of Congress and the decisions interpreting those acts which led to the enactment of the statute in question, it is obvious that the intention of Congress was to legislate to remedy conditions with respect to longshoremen injured while on navigable waters. Certainly, it had no intention of legislating with respect to railway employees engaged in interstate commerce, when by the very opinion of the U. S. Supreme Court, which was followed by Congress, it is stated that "Exercising another power,—to regulate commerce,—Congress has prescribed the liability of interstate carriers by railroad for damages to employees * * * and thereby abrogated conflicting local rules."

The U. S. Supreme Court says, Congress has already legislated with regard to railway employees engaged in interstate commerce, and what they should do if they want to legislate effectively with regard to longshoremen, is either to pass a similar Employers' Liability Act, or a compensation statute for such employees. Such a

statute is introduced, the purpose of it is explained to the body of Congress by one of its sponsors; its purpose, it is said, is to enact a special compensation act for longshoremen, and yet, with all these patent facts, by the decision of the lower Court, we find it applied to another class of employees.

And as further evidence of the intention of Congress not to include railway employees, it is well to note that when the bill was first introduced, it was so drawn as to include seamen. On January 14, 1927, in the second session of the 69th Congress, the House Judiciary Committee submitted a report (House Report 1767, p. 1687), the purport of which was substantially to the same effect as the Senate Committee Report, and the bill also referred to seamen in addition to longshoremen. At the same session of Congress on March 2, 1927, passage of the bill was debated (pp. 5402-5414), and Section 2, subdivision 3 was so amended as to exclude seamen. The bill was passed at that time in the House of Representatives, as amended.

On March 4, 1927, passage of the bill was debated in the Senate (pp. 5900-5909). Some reference was then made to the fact that the bill as returned from the House, was different from the original bill in that seamen were excluded, and Senator Norris, Chairman of the Judiciary Committee, explained why the seamen were omitted (p. 5908):

> "Mr. Norris: The seamen, through their organized representative, Mr. Furuseth, wanted to remain out. They were satisfied with their condition and did not want to be included in this law."

When we bear in mind the fact that by Section 33 of the Merchant Marine Act, seamen, injured through negligence, were given the same rights as railroad employees enjoyed under the Federal Employers' Liability Act, and that both seamen and railway employees engaged in interstate commerce, occupy the same position with respect to their rights and remedies under the law, (*Panama R. Co.* v. *Johnson,* 264 U. S. 375; *Engel* v. *Davenport,* 271 U. S. 33), then the inclusion of seamen in the bill as originally drawn, becomes very significant.

If Congress intended at any time to include railway employees, why wouldn't they include in the wording of the bill, some reference to railway employees engaged in interstate commerce? Seamen occupy the same position as railway employees with regard to their remedies, and when the intention first was to include the seamen, the bill was so worded as to make direct and specific reference to them. Obviously, the intention of Congress was not to include railway employees.

Stronger evidence of the intent of Congress is found in the fact that in 1928 it passed an act providing for workmen's compensation for employees in the District of Columbia. (Act of May 17, 1928, 45 Stat. 600; 33 U. S. C. A. Sec. 901, note.) This Act in part, provided as follows, Section 901:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the provisions of the Act entitled 'Longshoremen's and Harbor Workers' Compensation Act,' approved March 4, 1927, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer

carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term 'employer' shall be held to mean every person carrying on any employment in the District of Columbia, and the term 'employee' shall be held to mean every employee of any such person.

Sec. 2. *This Act shall not apply in respect to the injury or death of* (1) a master or member of a crew of any vessel; (2) *an employee of a common carrier by railroad when engaged in interstate or foreign commerce or commerce solely within the District of Columbia;* (3) an employee subject to the provisions of the Act entitled 'An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes,' approved September 7, 1916, as amended; and (4) an employee engaged in agriculture, domestic service, or any employment that is casual and not in the usual course of the trade business, occupation, or profession of the employer.

Sec. 3. This Act shall take effect July 1, 1928." (Italics ours.)

It is to be observed that Congress, in enacting a workmen's compensation statute for the District of Columbia, made applicable the provisions of the Longshoremen's & Harbor Workers' Compensation Act to this enactment, and specifically exempted the application of the statute to employees of common carriers by railroad engaged in interstate commerce. Admittedly, this statute does not cover a railway employee engaged in interstate commerce, although working in navigable waters. The in-

tention of Congress, in passing this statute, was apparently not to legislate with regard to railway employees engaged in interstate commerce.

In the light of this obvious purpose, it is difficult to find any intention on the part of Congress, to legislate with regard to railway employees engaged in interstate commerce, in the Longshoremen's & Harbor Workers' Compensation Act.

It may be contended that the inclusion of Section 2 of the Act relating to the District of Columbia, and the absence of any such provision in the Longshoremen's Act, indicates just the contrary of our premise. But the answer to such contention, if made, is that Congress, in the Longshoremen's Act, legislated specifically with regard to longshoremen and harbor workers engaged in maritime employments, and found no reason for excepting a class of employees, namely railway employees engaged in interstate commerce, with regard to which it had not legislated, while in the District of Columbia Compensation Act, it had specifically included all employments in the District of Columbia. In including all employments, it obviously included railway employees engaged in interstate commerce, and was necessarily compelled, in order to carry out its intention, to insert a specific clause excepting such employees.

POINT III.

By interpreting this statute to include railway employees engaged in interstate commerce, there arises a maze of inconsistencies, contradictions and confusion in their rights and remedies, as to clearly show an absence of intent on the part of Congress, in view of the past congressional legislation on the subject, to include this class of men.

The petitioner contended in the Circuit Court of Appeals, that if this act be held to apply to him, it must necessarily be held to apply to all railway employees who were injured while working in navigable waters, although engaged in interstate commerce. The basis for this argument was that if a man loading freight into freight cars on a railroad float is engaged in maritime employment within the meaning of the act, then a brakeman, conductor or engineer moving freight cars onto the float falls in the same category. And to go even further, if the mere fact that petitioner was injured while working in navigable waters removes him from the provisions of the Federal Employers' Liability Act, then it would operate with like effect upon other classes of railway employees engaged in interstate commerce. In regard to this contention, the Court states the following (R. 61):

> "Moreover, it does not follow that the mere *locus* of the accident necessarily determines the right. A brakeman coupling cars upon a float, or an engineer driving his engine on a float bridge may not be in maritime service just because he is over the water at the moment. See *Cope* v. *Vallette Dry Dock Co.*, 16 Fed. 924, 925 (C. C.

> La.), aff'd 119 U. S. 625, 7 S. Ct. 336, 30 L. Ed. 501. We do not say that he is not. We merely pass that problem until it shall arise."

We do not think this statement is correct. This Court has repeatedly expressed the rule in this regard, and in *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U. S. 479, repeated it again, page 480:

> "'The general doctrine that, in contract matters, admiralty jurisdiction depends upon the nature of the transaction and, in tort matters, upon the locality, has been so frequently asserted by this Court that it must now be treated as settled.' *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, 476, 66 L. Ed. 321, 324, 25 A. L. R. 1008, 42 Sup. Ct. Rep. 157."

Cope v. *Vallette Dry Dock Co.* involved a question in an action to recover for salvaging a dry dock, and the Court held that the action was not within the admiralty jurisdiction. An action of that kind is more in the nature of a quasi contract and not one in tort. It must therefore be assumed that a brakeman, conductor, locomotive engineer or any other railway employee who happens to be injured while working on a float, is in no different position than the petitioner in this case. The application of the Longshoremen's Statute to this class of employees in effect amounts not only to a deprivation of their right of action under the Federal Employers' Liability Act, but of their right of action under the Safety Appliance Act (45 U. S. C. A. Secs. 1-21) and Boiler Inspection Act (45 U. S. C. A. Secs. 22-34).

If any of these employees, while on a float, is injured through the failure of couplers on freight cars to couple

automatically on impact, he would be entitled to recover for his damages, providing, of course, the Safety Appliance violation was the proximate cause of the accident. (Section 2, Safety Appliance Act; *Chicago, Great Western Rd. Co.* v. *Schendel*, 267 U. S. 287.)

According to the holding, however, of the Circuit Court of Appeals, the fact that he was injured while on navigable waters would necessarily bring him within the provisions of the Longshoremen's Compensation Act. Likewise, if any of these employees was injured while on the float due to the violation of the Boiler Inspection Act, he would, prior to the passage of the Longshoremen's Act, be entitled to recover for his damages under that statute. *Baltimore & Ohio Ry. Co.* v. *Groeger*, 266 U. S. 521; *Great Northern Ry. Co.* v. *Donaldson*, 246 U. S. 121. This statute would, in effect, also be supplanted.

A pertinent question, therefore, is this: Did Congress intend by this Longshoremen's Statute, to supplant without any mention of the fact, the Safety Appliance Act, which has been on the statute books since 1893, and the Boiler Inspection Act? Did it intend to legislate with regard to brakemen, locomotive engineers or conductors employed by common carriers in interstate employment? Did it intend to deprive these employees of rights under the railroad statutes, merely because they happened to be on a float in navigable waters?

It may be contended that the Act was not intended to apply to this class of employees, but only to freight handlers. Then let us assume that a freight handler is told by his superior to adjust the couplers between two cars on a float, and while doing so, is injured. Would not the freight handler be in the same position as the brakeman, and entitled to the remedies afforded by the

Safety Appliance Act, or is this statute only to be applied to freight handlers while engaged in handling freight, and not while engaged in any other kind of work?

Furthermore, if it was intended to apply to freight handlers only, then is not the loading of freight cars on to a float similar to loading freight into the freight cars, and would not a brakeman injured while moving cars on to a float, be entitled to pursue his remedy under the Federal Employers' Liability Act? Is it reasonable to suppose that Congress intended to so deflect the course of legislation with regard to these railway employees, as to create a situation such as the one we have here? We do not think so.

The holding of the Circuit Court of Appeals, if pursued to its logical conclusion, would give this statute a far-fetched interpretation, and when we bear in mind the history of legislation covering railway employees, the conclusion becomes irresistible that Congress never intended by this statute, without giving any inkling of an intention to so legislate, to brush aside the statutes affecting railway employees engaged in interstate commerce, and railway employees of interstate common carriers generally, which were enacted during the last thirty-five years.

These statutes, when passed, had the support of various organizations of railway employees, were favored by them, and their passage was urged vigorously in their behalf. Congress never intended to amend in any respect, this well-defined legislation regarding railway employees, without as much as mentioning the word "railway".

Of course, to give effect to the statute in question, so as to include the plaintiff in this case, would be tanta-

mount to a repeal of the Federal Employers' Liability Act, so far as it is applicable to freight handlers engaged in interstate commerce, and it is a well known principle of law, that the courts do not favor repeals of statutes by implication.

McCool v. *Smith*, 66 U. S. 419;
United States v. *Greathouse*, 166 U. S. 601;
Cope v. *Cope*, 137 U. S. 682.

In the words of the decision in *Cope* v. *Cope*, *supra* (p. 686):

> "Nothing is better settled than that repeals, and the same may be said of annulments, by implication, are not favored by the courts, and that no statute will be construed as repealing a prior one, unless so clearly repugnant thereto as to admit of no other reasonable construction. *McCool* v. *Smith*, 66 U. S. Black 459 (17:218); *Bowen* v. *Lease*, 5 Hill, 221; *Ex parte Yerger*, 75 U. S. 8 Wall. 85, 105 (19:332, 339); *Furman* v. *Nichol*, 75 U. S. 8 Wall. 44 (19:370); *United States* v. *Sixty-seven Packages*, 58 U. S. 17 How. 85 (15:54); *Red Rock* v. *Henry*, 106 U. S. 596 (27:251)."

Similar utterances are contained in *United States* v. *Greathouse*, *supra* (p. 605):

> "But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them. *Frost* v. *Wenie*, 157 U. S. 46, 58 (39:614, 619); *United States* v. *Healy*, 160 U. S. 136, 147 (40:369, 373)."

McCool v. *Smith, supra,* expresses the same doctrine (p. 470):

> "'A repeal by implication is not favored.' 'The leaning of the courts is against the doctrine, if it be * * * possible to reconcile the two Acts of the Legislature together.' Sedg. Stat. and Cons. Law, 127; *Canal Co.* v. *R. R. Co.,* 4 Gill & J., 1; *Bowen* v. *Lease,* 5 Hill, 221; *Williams* v. *Potter,* 2 Barb., 316."

Especially is this principle applicable when by a series of legislative enactments and decisions of the courts creating definite rights and liabilities for railway employees, their status is so definitely fixed and established.

SOL GELB,
Counsel for Petitioner.

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Supreme Court of the United States

October Term, 1929

No. 248

VICTORIO NOGUEIRA,

Petitioner,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

BRIEF ON BEHALF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JOHN M. GIBBONS,
Counsel for Respondent.

EDWARD R. BRUMLEY,
EDMUND J. MOORE,
Of Counsel.

E. W. TRAVER, Law Printer, 154 Nassau St., N. Y. (Tel. Beekman 2726)

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Supreme Court of the United States

October Term, 1929

VICTORIO NOGUEIRA, *Petitioner,* against THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.	No. 248.

BRIEF ON BEHALF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below

The Trial Court, United States District Court for the Southern District of New York, said:

> "This injury arose upon a boat on navigable waters, a boat of more than 18 tonnage. The Compensation Act passed by Congress provides compensation for disability or death, and in view of the nature of this Compensation Act, I am thoroughly convinced that this Court has no jurisdiction, and that this man's remedy is one of application under the compensation act. Therefore the motion to dismiss is granted" (R., 66, 68).

The Circuit Court of Appeals, Second Circuit, affirmed the judgment, Circuit Judge Swan writing the opinion (32 Fed. (2d) 179).

Jurisdiction of This Court

(a) The jurisdiction of this Court is sought to be invoked under Section 240 of the Judicial Code, as amended, Subdivision (a) (43 Stat. 938).

(b) The judgment sought to be reviewed is dated July 17th, 1928 (R., 13). The present petition was filed in this Court on the 15th day of July, 1929.

(c) This case was tried before the Honorable Walter C. Lindley and a jury in the United States District Court for the Southern District of New York, on July 11th, 1928. The action was brought under the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, § 1, 35 Stat. 65), to recover damages for personal injuries received by plaintiff while in the employ of The New York, New Haven and Hartford Railroad Company as a laborer and freight handler at Pier 42, East River, New York City, on October 13th, 1927 (R., 3-6).

The Trial Court held that the injury arose upon a boat on navigable waters, a boat of more than 18 tonnage, that the Compensation Act applied, that the Court had no jurisdiction, and granted the motion to dismiss (R., 66, 68, 69).

In the lower Courts petitioner contended that the Longshoremen's & Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, § 1, 44 Stat. 1424) had no application to the case; that it was never intended to have any application to one in petitioner's position; that the meaning of the Statute is distorted by any such interpretation; that it was never the intent of Congress to make the Statute ap-

plicable to railway employees engaged in interstate commerce; that the wording of the Statute is not sufficiently broad to include interstate railway employees; that the term "maritime employment" was not intended to cover those employees engaged in an adjunct to transportation by rail (R., 19, 20, 44-54, 65-67, 68, 69; petition for writ of certiorari, p. 4).

The complaint was dismissed at the end of the plaintiff's case, and judgment was rendered in favor of the defendant (R., 13).

Statement of the Case

Petitioner brought this action to recover for injuries alleged to have been received by him on October 13th, 1927, while in respondent's employ as a laborer and freight handler (R., 3). At Pier 42 he put a bale of paper on a truck and started to truck the bale down a plank running from the dock to the float (R., 28, 30-32). When he got down on the float the handtruck and bale went over his leg (R., 43). The accident happened on navigable waters, in the East River (R., 66). The float weighed over 500 pounds (R., 65, 66).

On the appeal to the United States Circuit Court of Appeals for the Second Circuit, respondent argued that the Longshoremen's & Harbor Workers' Compensation Act of March the 4th, 1927, was exclusive and controlled the case at bar. Respondent contended that its interpretation would distribute compensation regardless of fault, according to the plain terms of the statute, resulting in no absurdity or injustice, promoting uniformity.

Question Presented

Whether the Federal Employers' Liability Act of 1908, as amended, or whether the Longshoremen's & Harbor Workers' Compensation Act of 1927, applies to employees of railroads, when both are engaged in interstate commerce, when such employees are injured on navigable waters, while doing the work of longshoremen.

Argument

The petition for writ of certiorari should be granted:

(1) The Circuit Court of Appeals for the Second Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

(2) There is the need of a final decision in respect of the field of rights and remedies of railroad employees, engaged in interstate commerce, but doing longshore work, on navigable waters.

(3) To obtain this final decision is obviously important for injured employees, the United States Employees' Compensation Commission, and the railroads.

(4) A decision by this Court, at this time, will avoid conflicting decisions by other Circuit Courts of Appeals on the same matter.

(5) The number of decisions of this Court relating to longshoremen, stevedores, seamen, indicates a willingness to clarify a situation essentially confusing.

While the respondent considers its position correct, and the opinion of the Circuit Court of Appeals unanswerable, it joins in the petition for a writ of certiorari for the reasons given.

The Federal Employers' Liability Act of 1908 probably covered certain stevedores of railroads. See *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 213. Between 1908 and 1920 attempts were made to apply state compensation laws to stevedores. We first have the decision of this Court in *Southern Pacific Co.* v. *Jensen, supra,* interpreting the Judiciary Act of 1789, § 9, 1 Stat. 73, 77. Then in October, 1917, Congress passed a law expressly saving to claimants rights and remedies under state workmen's compensation laws (Act of October 6, 1917, c. 97, 40 Stat. 395), declared unconstitutional in *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149. By the so-called Jones Act (Act of March 4, 1915, § 20, c. 153, 38 Stat. 1185, as amended by § 33 of Act of June 5, 1920, c. 250, 41 Stat. 1007), seamen, including stevedores, came under the provisions of the Federal Employers' Liability Act. This Court has treated the subject matter in several cases, among others:

Industrial Comm. v. *Nordenholt Corp.,* 259 U. S. 263; *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375; *Engel* v. *Davenport,* 271 U. S. 33; *Internat. Stevedore Co.* v. *Haverty,* 272 U. S. 50; *Pacific S. S. Co.* v. *Peterson,* 278 U. S. 130; *Plamals* v. *"Pinar Del Rio," etc.,* 277 U. S. 151; *Buzynski* v. *Luckenbach S. S. Co.,* 227 U. S. 226; *Northern Coal & Dock Co.* v. *Strand,* 278 U. S. 142; *London Guarantee & Accident Co.* v. *Industrial Accident Commission,* 279 U. S. 109; *Baltimore Steamship Co.* v. *Phillips,* 274 U. S. 316.

On June 10th, 1922, Congress passed an amendment to §§ 24 and 256 of the Judicial Code (Act of Congress of June 10, 1922, c. 216, 42 Stat. 634), declared unconstitutional in *Washington* v. *Dawson & Co.*, 264 U. S. 219. This was the third attempt to place stevedores under the state workmen's compensation laws.

We now come to the Longshoremen's & Harbor Workers' Compensation Act of March 4th, 1927, *supra,* which affords longshoremen Federal compensation. This Act made a broad classification with express exclusion of master and members of crew, and vessels under 18 tons, but did not exclude railroad employees. The Act of May 17th, 1928, c. 612, 45 Stat. —, relating to the District of Columbia, expressly excludes employees of common carriers of railroad when engaged in interstate or foreign commerce.

The Longshoremen's & Harbor Workers' Compensation Act has been considered in the following cases, but the decisions do not affect the present question:

Chernik v. *Clyde Steamship Co.*, 248 N. Y. 508, petition for writ of certiorari denied in 278 U. S. 637; *Perry* v. *United States Employees' Compensation Commission,* 27 Fed. (2d) 144; *F. Jarka Co.* v. *Monahan,* 29 Fed. (2d) 741; *Obrecht-Lynch Corp. et al.* v. *Clark,* 30 Fed. (2d) 144; *The Pacific Pine,* 31 Fed. (2d) 152; *Howard* v. *Monahan,* 31 Fed. (2d) 480; *Texas Employees' Ins. Ass'n* v. *Sheppard,* 32 Fed. (2d) 300; *Merchants' & Miners' Transp. Co.* v. *Norton,* 32 Fed. (2d) 513; *Wellgeng* v. *Marshall,* 32 Fed. (2d) 922; *Benson* v. *Crowell,* 33 Fed. (2d) 137; *Joyce* v. *U. S. Deputy Comm.,* 33 Fed. (2d) 218; *Pocahontas Fuel Co., Inc., et al.* v. *Monahan,* August 3, 1929, reported in U. S. Daily, August 15, 1929, page 8, District Court for the District of Maine.

It is obvious that the Longshoremen's & Harbor Workers' Compensation Act has become a frequent source of litigation and a decision by this Court, at this time, will avoid possible conflicting decisions by Circuit Courts of Appeals.

Conclusion

We respectfully submit that the present petition should be granted.

JOHN M. GIBBONS,
Counsel for The New York, New Haven and Hartford Railroad Company.

EDWARD R. BRUMLEY,
EDMUND J. MOORE,
Of Counsel.